IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

AARON ROME,	§	
Plaintiff	§	
	§	
v.	§	**CIVIL ACTION NO. 3:16-cv-02480-N**
	§	
HCC LIFE INSURANCE COMPANY	§	
and HCC SPECIALTY	§	
UNDERWRITERS, INC.,	§	
Defendants	§	

PLAINTIFF'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO MODIFY ORDER ON DEFENDANT HCC LIFE INSURANCE COMPANY'S MOTION TO DISMISS, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

TO THE HONORABLE UNITED STATES DISTRICT JUDGE DAVID C. GODBEY:

COMES NOW, Aaron Rome ("Rome"), Plaintiff herein, and files *Plaintiff's Reply to Defendants' Response to Plaintiff's Motion to Modify Order on Defendant HCC Life Insurance Company's Motion to Dismiss or, In the Alternative, Motion for Summary Judgment* and would show unto the Court the following:

I.
SUMMARY

Defendants HCC Life Insurance Company and HCC Specialty Underwriters, Inc. (collectively "HCC") opposes Rome's *Motion to Modify Order on Defendant HCC Life Insurance Company's Motion to Dismiss or, In the Alternative, Motion for Summary Judgment ("Motion")* because it is untimely and is an unexceptional case. *See Defendants' Response to Plaintiff's Motion to Modify Order on Defendant HCC Life Insurance Company's Motion to Dismiss or, In the Alternative, Motion for Summary Judgment ("Response"),* at p. 1. Without specifics, HCC contends an appeal will delay the ultimate resolution of this cause.

HCC predictably treats this lawsuit as some run of the mill ERISA case. HCC does not confront Rome's arguments why the interlocutory appeal being sought presents classic grounds for a certification, particularly given the status of the case and ERISA preemption which greatly affects this case. Tellingly, HCC cannot even reconcile who is the administrator of the so-called HCC Life Insurance Company policy ("Policy") that HCC says either is the ERISA plan or a part of a plan.

The certified appeal Rome seeks is whether his original claims are ERISA preempted, a subject matter of vigorous disagreement among federal courts. This issue also has ramifications for hundreds of professional hockey players who are consistently and regularly injured. No court has decided whether the HCC Policy is ERISA controlled. The question presented is a pure legal one which will undoubtedly have a genuine controlling effect on this litigation and resolution of Rome's claims, but also provide answers to the many hundreds of NHL players.

Rome's *Motion* should be granted.

II.
PURE LEGAL QUESTION

No court has addressed, in any reported opinion, whether the HCC Policy is governed by ERISA and more particularly, whether the HCC Policy is part of an ERISA plan. The facts presented are not in dispute. The controlling question is whether ERISA preempts Rome's claims brought in his original lawsuit. The issue to be appealed is one of law which will dictate the handling, procedure, and scope of discovery for the entire litigation. If ERISA applies, then the entire scope and approach of discovery will be distinctly different, as well as how the case is tried. In contrast, no ERISA means broad but relevant discovery, no standards of discretion apply to the claim's decisionmaker, extra-contractual claims are viable, the exposure to damages beyond the policy benefits, and a jury trial is permitted. The differences and contrasts are stark and material.

Courts dealing with this element have found that ERISA preemptions are pure legal questions that satisfy Section 1292(b) criteria. *See e.g., Harris Trust and Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 244 120 S.Ct. 2180, 2186, 147 L.Ed.2d 187 (2000); *E.I. Dupont de Nemours & Co. v. Sawyer*, 517 F.3d 785, 790 (5th Cir. 2008); *Mello v. Sara Lee Corp.*, 431 F.3d 440, 442 (5th Cir. 2005); *Taylor v. PPG Industries, Inc.*, 256 F.3d 1315, 1316 (5th Cir. 2001); *Dist. 65 Retirement Trust for Members of Bureau of Wholesale Representatives v. Prudential Securities, Inc.*, 925 F.Supp. 1551, 1570–71 (N.D. GA. 1996); and *Moorman v. Unumprovident Corp.*, 2005 WL 6074572, at *8–9 (N.D. GA 2005). Preemption is a pure question of law presented by Rome.

III.
CONTROLLING LAW MATERIALLY AFFECTING THE OUTCOME OF THE LITIGATION

"Whether an issue of law is controlling generally hinges upon its potential to have some impact on the course of the litigation." *Alverson v. BL Restaurant Operations, LLC*, 2018 WL 1618341, at *3 (W.D. Tex. April 3, 2018) (citing *In re Delta Produce*, 2013 WL 3305537, at *2 (W.D. Tex. June 28, 2013)). Stated another way, ". . . all that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of the litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026–27 (9th Cir. 1982). This means the "certified issue has precedential value for numerous cases." *Alverson*, 2018 WL 1018341, at *3. It does not mean the controlling law be dispositive, but, if answered, will or can shorten the time, effort and expense for resolving the lawsuit—from the time of filing to resolution. *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 403 (S.D. Tex. 1969); *Joe Grasso & Son, Inc. v. U.S.*, 42 F.R.D. 329, 334 (S.D. Tex. 1966), *aff'd* 380 F.2d 749 (5th Cir. 1967).

These considerations apply with equal vigor here. If no ERISA, discovery becomes broader, liability exposure to the Defendants is much larger, attorneys' fees are not discretionary, and those subject to liability are numerous. If this Court erred in its ERISA preemption determination, the reset button means broader and more extensive discovery, more liability exposure, a jury trial—a completely different case.

If ever a case satisfied the necessary criteria, this lawsuit does. Any interlocutory appeal in this cause comes before any discovery has taken place, before any scheduling order issued, or any other significant activity has taken place except the order complained of. "A controlling question of law arises only if it may contribute to the determination, at an early stage, of a wide spectrum of cases." *Mariner Energy, Inc. v. Devon Energy Production, Co.*, 2010 WL 11583177, at *2 (S.D. Tex. July 15, 2010) (citing *Federal Deposit Ins. Corp. v. First National Bank of Waukesha Wisconsin*, 604 F.Supp. 616, 620 (E.D. Wis. 1985)). By certifying an interlocutory appeal, the parties can litigate once with no uncertainty of which law applies.

IV.
HCC'S AUTHORITIES ARE NOT ON POINT

HCC sprinkles various case citations in its *Response*, contending they discredit Rome's *Motion*. Indeed, they proudly refer to several decisions from this Honorable Court. But upon examination, HCC's authorities are materially distinguishable and not helpful:

1. *Clark-Dietz and Associates-Engineers, Inc. v. Basic Const. Co.*, 702 F.2d 67 (5th Cir. 1983)—addresses the unremarkable proposition that an interlocutory appeal "does not lie simply to determine the correctness of a judgment for liability." *Id.* at 67. Liability is not the issue for Rome's certification request;

2. *Little v. Stanford Trust Co.*, 2015 WL 13741932 (N.D. Tex. Sept. 22, 2015) (Godbey, J.)—holds a fact question does not satisfy the criteria for 28 U.S.C. § 1292(b);

3. *St. Denis J. Villere & Co. v. Caprock Communications Corp.*, 2003 WL 21339286 (N.D. Tex. June 4, 2003) (Godbey, J.)—holds that group pleading and pleading fraud with particularity are "not such stuff as interlocutory appeals are made on." *Id.* at *1; and

4. *Stoffels ex rel. SBC Telephone Concession Plan v. SBC Communications, Inc.*, 572 F.Supp.2d 809 (W.D. Tex. 2008)—concerns, not whether ERISA applies, but whether a retirement plan was a particular type of pension plan. *Id.* at 811–14. The main opinion surrounding the request for certification was vacated on reconsideration. 2011 WL 1515105 (W.D. Tex. Jan. 14, 2011).

HCC, in contrast, neglects to acknowledge ERISA preemption authority where the controlling issue would support an interlocutory appeal. *Sawyer*, 517 F.3d at 790; *Mello*, 431 F.3d at 442; and *Taylor*, 256 F.3d at 1316 (preemption of state law claims); *Dist. 65 Retirement Trust for Members*, 925 F.Supp. at 1571 (holding substantial grounds for differences of opinion regarding extent of ERISA preemption of state law claims); and *In re Cement Antitrust Litigation*, 673 F.2d at 1026–27.

In the area of ERISA preemption of state law claims, there is ample disagreement supporting an interlocutory appeal.

V.
NO IMPROPER DELAY

HCC avers that an interlocutory appeal will result in needless delay. HCC does not explain why but rather relies on an unsubstantiated conclusion perhaps because they think it sounds good. But this bald and unsubstantiated proclamation is betrayed by common sense, legal considerations, and the status of this litigation.

Assuming Rome waits for an appeal and succeeds by establishing ERISA does not preempt his claims, then the result will be, at the very least, a complete do-over. Rome will be entitled to a complete reset including a large amount of discovery evaluated by a broad relevance standard tied to his original pleadings dealing with not only a breach of contract claim but extra-contractual

causes of action, pretextual denials, significant damages that can be double or even trebled under the Texas Insurance Code, new and more easily satisfied standards and tests for extra-contractual damages (*see USAA Texas Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)), no issues of an administrator's discretion, not being restricted to an administrative record, the roles of various defendants including those voluntarily nonsuited in order to expedite the litigation, mandatory recovery of attorneys' fees, 18% Prompt Pay Statute interest plus additional pre-judgment interest, the licensure of HCC representatives to adjust Rome's Texas claim, and a jury trial. The differences between an ERISA case and one under Texas law are substantively significant and different. *Moorman*, 2005 WL 6074572, at *8; *Insurance House, Inc. v. Insurance Data Processing, Inc.*, 2009 WL 10669726, at *5 (N.D. GA March 26, 2009).

The good and critical news is the status of this litigation reveals there is no scheduling order in place including a trial date, no discovery has been taken, no motions are pending except this one, no efforts have been made toward the actual merits, and no party can be prejudiced thereby. Getting the ERISA question answered now permits the parties to know how this case should be evaluated, discovered, tried, and decided. There will be no reset button on grounds of ERISA preemption if an interlocutory appeal is permitted now. Whether ERISA preempts Rome's claims will not be an issue for a post-trial appeal. Having that issue decided will undoubtedly determine a resolution—perhaps even before a trial that could lead to an appeal.

Given the stage of this case, an interlocutory appeal makes absolute legal sense. The Fifth Circuit would be reviewing a limited record: indeed a consideration for an interlocutory appeal is avoidance of an extensive record for an appellate court to review. *Alverson*, 2018 WL 1618341, at *4–5.

There is no needless delay and the time for an interlocutory appeal is most appropriate given the status of this litigation.

VI.
NO UNTIMELY REQUEST

HCC complains that Rome's request for certification of an interlocutory appeal is untimely. This argument is objectively meritless and explains why it consists of two paragraphs dependent on string cites with superficial analysis.

HCC cites Judge Pittman's thoughtful analysis in *Teladoc, Inc. v. Texas Medical Board* regarding the timing of requesting certification orders. *See* 2016 WL 4362208 (W.D. Tex.—Aug. 15, 2016). That opinion demonstrates HCC's misguided timeliness attack on Rome's request for certification of this Court's June 20, 2018 order.

Initially, the ten-day deadline to request the Fifth Circuit to accept the certified interlocutory appeal only begins when the district court enters the certification order—not before. *See* 28 U.S.C. § 1292(b). Thus, HCC's argument that Rome missed the ten-day deadline is factually inaccurate. HCC knows no statutory deadline in Section 1292(b) was missed, and its argument in this regard is certainly questionable.

Secondly, the facts presented do not demonstrate a lack of diligence and unexplained indifference to filing the motion to certify this Court's June 20, 2018 order for an interlocutory appeal. As HCC notes, Rome gave timely notice to appeal this Court's judgment of June 20, 2018 dismissing Rome's claims. *See Plaintiff Aaron Rome's Notice of Appeal* filed July 20, 2018 (Doc. Entry No. 54). In filing the notice of appeal, the District Court was divested of jurisdiction and therefore could not rule on a motion to certify an interlocutory order. *Teladoc*, 2016 WL 4362208, at *2; *In re Scopac*, 624 F.3d 274, 280 (5th Cir. 2010).

Additionally, Rome contemplated up until the last day to appeal to stand on the original filing and not amend. Ultimately, Rome elected to file an amended complaint in compliance with this Court's judgment of June 20, 2018 in order to further evaluate an appeal. Following HCC's motion to dismiss Rome's appeal, Rome requested the Fifth Circuit allow Rome time to obtain a certification order from this Court. *See Appellant's Response to Appellee's Motion to Dismiss for Want of Jurisdiction,* hereto attached as Exhibit 1. Although unsuccessful in preventing the appeal from being dismissed, Rome did file his request for certification on August 27, 2018 as HCC admits.

From June 20, 2018, and long before, until August 27, 2018 when Rome requested certification, there was zero noticeable activity of any kind in this case except for Rome's own filings and an answer to the amended complaint. The only case activity was Rome's Notice of Appeal, the filing of Rome's First Amended Complaint, Defendants' Answer and Rome's certification motion. There was no scheduling order entered, no discovery requested or taken, no dispositive motions filed, no challenge to Rome's First Amended Complaint—no activity, procedural or substantive, that would in any way prejudice HCC by Rome seeking certification of an interlocutory appeal on August 27, 2018.

As Judge Pittman wrote in *Teladoc,* a case's procedural posture is part of the timing analysis for a request for certification of an interlocutory appeal. *Teladoc,* 2016 WL 4362208, at *4. The procedural posture of a case compels the determination of timelines. *Id.* In *Teladoc*, Judge Pittman found the plaintiffs would be prejudiced in their briefing schedule if the district court were to recommend an amended certification be entered, which could not be done unless the Fifth Circuit remanded the appeal/case for the district court to enter such an order. *Id.* The procedural

posture would delay the pending appeal and prejudice the plaintiffs and thus the request was untimely. *Id.*

Unlike *Teladoc*, there is no activity, no pending appeal, nothing that would prejudice HCC or undermine this Court's procedures, docket, and core functions. Furthermore, the timing of the certification motion is not unexplained, as Rome contemplated standing on his original complaint. Moreover, as long as a pending appeal existed, this Court was without jurisdiction to entertain any certification motion and any filing would have been premature at best. *Id.* at *2. Indeed, Rome did file his certification motion before this Court regained jurisdiction.

Lastly, the timing of the certification motion, for which there was no specific deadline, had no effect on HCC, this Court, or anything of substance. No party was prejudiced, no docket control or scheduling order impaired or defied, no delay to the disposition of this cause, and no defiance of core functions or the respect due to this Honorable Court. Rome intended to pursue an appeal of this Court's June 20, 2018 order and did not remain dormant.

HCC's timeliness complaint is without merit.

VII.
CONCLUSION

HCC's opposition to certifying this Court's June 20, 2018 order is dependent on generalities, string cites with no meaningful substantive analysis, misanalysis and mechanical arguments. Rome's request for certification was made at the outset of this litigation before any scheduling order has been issued, any discovery taken, and any extensive record developed. The decision about Rome's claims and any ERISA preemption will determine how this case is discovered, how it is handled, and how it is tried or decided. The nature and extent of damages and remedies are decided by whether ERISA preemption applies or not. At this stage, it makes

complete sense to have an interlocutory appeal to decide this obvious issue of controlling law. It preserves judicial resources, fees and costs, time, and efforts. A limited record exists for review.

Rome's *Motion* should be granted.

WHEREFORE, PREMISES CONSIDERED, Rome prays this Court grant his *Motion* and grant Rome such other and further relief to which he is entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served electronically by operation of the Court's electronic filing system to all counsel of record on this the 22nd day of October 2018.

/s/ Jennifer W. Johnson
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